IN THE

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1380

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant,

VS.

CHARLES EDWARD WILSON, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees move that the final judgment and order of the District Court be affirmed on the ground that the court's judgment is manifestly correct and the issue raised by the appeal is so unsubstantial as not to need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are set forth at pp. 2-3 of appellant's Jurisdictional Statement and in Appendix D thereto, with the exception of portions of section 1905(a) of the Social Security Act, 42 U.S.C. § 1396d(a), which are set out in Appendix A of this Motion to Affirm.

STATEMENT*

1. Title XVI of the Social Security Act, Supplemental Security Income ("SSI"), 42 U.S.C. § 1381 *et seq.* (1976 & Supp. II 1978) creates a comprehensive uniform "national program" of cash assistance to persons who are needy and "who have attained age 65 or are blind or disabled. . . ." 42 U.S.C. § 1381. Except those affected by the provision at issue in this case, all indigent aged, blind or disabled legal residents of the 50 states and the District of Columbia are eligible for SSI unless they leave the United States or refuse to cooperate with SSI administrators. 42 U.S.C. §§ 1381a, 1382. Included among those defined as disabled are the mentally disabled. 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.901 *et seq.* (1979). The normal monthly payment to a non-institutionalized single aged, blind or disabled

* The Secretary of Health, Education and Welfare's Jurisdictional Statement (at 2-6) generally describes the statutory scheme. The Statement here discusses only aspects of that scheme the Secretary does not adequately describe or specifically address. It does not review the prior proceedings herein, which the Secretary's Jurisdictional Statement accurately sets forth.

individual is currently $208.20.* SOCIAL SECURITY ADMINISTRATION SSI CLAIMS MANUAL § 13127 (1979).

2. This case, however, concerns appellees' entitlement to a monthly $25 SSI payment normally made to otherwise eligible persons in medical institutions, but denied appellees because they are institutionalized in public mental hospitals and are between the ages of 21 and 64. This payment is a personal needs allowance intended for items other than medical care, food and shelter. (*See* pp. 7-8, 14-16, *infra*).

Section 1611(e)(1) of the Act, 42 U.S.C. § 1382(e)(1), effects the statutory exclusion at issue here. Jurisdictional Statement at 26a. It provides:

> (A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.
>
> (B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this chapter, the benefit under this subchapter for such individual for such month shall be payable (i) at a rate not in excess of $300 per year [$25/month]. . . .

The Secretary characterizes subsection (e)(1)(A) of this provision, which refers to an "inmate of a public institution," as generally excluding from the $25 monthly payment all residents of public institutions, and

* All figures used herein assume the SSI recipient has no other countable income; the SSI grant is reduced by the recipient's countable income until such income exceeds the SSI standard, at which point the individual is no longer needy within the meaning of the statute. 42 U.S.C. § 1382(a).

subsection (e)(1)(B) as then reincluding a "limited" or "narrow" class of persons. Jurisdictional Statement at 4, 8. In fact, the "reinclusion" virtually swallows the exclusion. It is more accurate to say that the statute generally entitles disabled persons in medical institutions to the $25 monthly payment, but excludes a "limited" class of such persons from these benefits. Specifically, as described below, all otherwise eligible residents of medical institutions are entitled to SSI benefits—except for appellees here, and a small number of tubercular patients.*

3. The grant of SSI eligibility to all groups of needy persons in public or private medical institutions, except appellees and a small number of tubercular patients, is a result of two factors. First, the statutory exclusion applies only to persons in *public* institutions. Second, this public institution exclusion is followed by the reinclusion of persons in public institutions and "receiving payments" under "subchapter XIX of this chapter." 42 U.S.C. § 1382(e)(1)(B). The reference is to the title establishing the Medical Assistance Program ("Medicaid"), 42 U.S.C. § 1396 *et seq.* (1976 & Supp. II 1978). Medicaid is a federal-state program on behalf of needy persons and provides vendor payments to medical professionals and, as relevant here, to virtually all public and private medical institutions.

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* The statutory exclusion from SSI benefits at issue here also applies to needy residents of public tuberculosis hospitals under age 65. *See* 42 U.S.C. § 1396d(a). The number of persons affected by this exclusion is very small. In 1976 there were at any one time only 2,000 residents (of all ages and all incomes) of tuberculosis hospitals (public and private) in this country. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1978). The number of such residents—many of whom (e.g. because not needy, or over 65, or in private institutions) would be unaffected by the exclusion in any event—had been dropping rapidly before 1976, *id.* at 109, and is likely to be even lower today.

(a) 42 U.S.C. § 1382(e)(1)(A) excludes from SSI benefits only residents of "public" medical institutions. Therefore, otherwise eligible inmates of private medical institutions are eligible for SSI. If the private institutions in which they reside receive Medicaid on their behalf, then these persons come within 42 U.S.C. § 1382(e)(1)(B) and receive $25/month for non-institutional personal needs. Persons residing in private institutions who do not receive Medicaid do not fall under the reduced payment provision of subparagraph (B); but they are not excluded by virtue of subparagraph (A) and therefore receive the normal $208.20 monthly payment.

(b) The statutory exclusion of SSI benefits for persons in a "public institution," 42 U.S.C. § 1382(e)(1)(A), does not apply, by virtue of 42 U.S.C. § 1382(e)(1)(B), to persons in an institution covered under Medicaid. Medicaid coverage is extremely broad. Among the types of institutional medical care specifically set out in the Medicaid statute are: in-patient hospital services, including psychiatric services in both public and private general hospitals; skilled nursing home services; in-patient hospital services and skilled nursing home services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases; intermediate care facility services, including services in public institutions for the mentally retarded; and services in a psychiatric hospital for individuals under age 21. 42 U.S.C. § 1396d(a)(1), (4), (15), (16). The statute also has a residual coverage clause:

> any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary. 42 U.S.C. § 1396d(a)(17).

42 U.S.C. § 1396d(a), however, goes on to exclude from coverage services for certain age groups in tubercular and psychiatric hospitals:

> except as otherwise provided in paragraph (16), [coverage of inpatient psychiatric services for individuals under age 21], *such term* ["medical assistance"] *does not include*—
>
> (A) any such payments with respect to care or services for any individual who is an inmate of a public institution (*except as a patient in a medical institution*); or
>
> (B) any such payments with respect to care or services for any *individual who has not attained 65 years* of age and who is a patient in an institution for tuberculosis or *mental diseases.** (Emphasis added.)

Thus one group of residents of tubercular and psychiatric hospitals is singled out for exclusion from Medicaid coverage. In the Medicaid program this exclusion occurs regardless of whether the hospital is public or private. Otherwise, Medicaid coverage sweeps broadly, including services in the full panoply of medical institutions.

Congress incorporated this Medicaid structure into the cash assistance SSI program, for residents of public but not private medical institutions. 42 U.S.C. § 1382(e)(1)(B). By virtue of that incorporation, appellees, who are aged 21-64 and are in public mental hospitals, have been singled out for exclusion from the benefits the SSI statute grants to all other eligible persons in medical institutions (*i.e.* private institutions not covered by Medicaid, or public or private ones covered by that program).

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* The Secretary omits these provisions from her Appendix D, which sets forth the other relevant statutory provisions. They are set forth in Appendix A hereto.

THERE IS NO SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW: THE DENIAL OF BENEFITS INVIDIOUSLY DISCRIMINATES AGAINST APPELLEES WITHOUT ANY BASIS RATIONALLY RELATED TO THE PURPOSES OF THE SSI STATUTE OR ANY LEGITIMATE GOVERNMENTAL INTEREST.

1. Central to this case is Congress' failure not only to give a reason for excluding appellees from the SSI program, but also to give any indication that it wanted to exclude, or understood that it was excluding, appellees. The Senate Finance Committee report accompanying Pub. L. No. 92-603, 86 Stat. 1329 (1972), which created the SSI program, states with respect to the $25 benefit to institutionalized persons:

> People who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get benefits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and *full benefits are not needed. Some payment to these people, though, would be needed* to enable them to purchase small comfort items not supplied by the institution. *No supplemental security benefits* will be paid to an individual in a *penal institution.* S.REP. NO. 1230, 92nd Cong., 2d Sess. 386 (1972) (emphasis added).

The House report is identical, except the words "No public assistance benefits . . . " are substituted for "No supplemental security benefits . . ." in the last sentence. H.R. REP. No. 231, 92d Cong., 2d Sess. 150 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 5136. As the District Court noted, the "history reveals no articulated legislative intent to exclude [appellees] from these benefits. . . ." Jurisdictional Statement at 15a-16a.

The Secretary incorrectly paraphrases the legislative history by saying that "[t]he reason for this exclusion [of appellees] was Congress' belief that the needs of these individuals were being met by the institutions in which they resided. [Citing H.R. REP. NO. 231, *supra*.]" Jurisdictional Statement at 8. The cited report actually shows that Congress gave no indication of or reason for the total exclusion at issue, but rather was explaining the reduced $25 payment as designed to meet the personal needs of patients which were not being met by the institution. Congress expressed an intent only to exclude an inmate of "a penal institution."

Congress continues not to recognize the exclusionary effect of 42 U.S.C. § 1382(e)(1) on some residents of medical institutions. The House Ways and Means Committee recently described the law as providing that "[a] recipient's monthly SSI benefit standard is reduced to $25 for any month during all of which he is in a medical institution," without recognizing that this statement is inaccurate for the plaintiff class in this case. H.R. REP. NO. 451 (Part I), 96th Cong., 1st Sess. 55 (1979).

2. The Secretary first argues that "the statutory scheme does not classify SSI recipients on the basis of mental health." Jurisdictional Statement at 10. This statement confuses the manner in which 42 U.S.C. § 1382(e)(1) effectuates the statutory exclusion of the appellees in this case. It creates the SSI exclusion by incorporating for public medical institution patients an institutional Medicaid eligibility classification based on mental health. As discussed, *supra* pp. 5-6, Medicaid's definition of covered care includes "any" medical care, wherever rendered (including public and private medical institutions)—"except" for certain groups of in-

dividuals who are "patient[s] in an institution for tuberculosis or *mental diseases*." 42 U.S.C. § 1396d(a)(B) (emphasis added). The Secretary recognizes that Congress incorporated into the SSI statute an exclusion defined by the Medicaid statute, but essentially refuses to look behind the incorporation to give significance to the substance of the SSI exclusion.*

It is of no legal significance in identifying the nature of the discrimination that some mental patients are granted the SSI benefits denied to appellees. The fact remains that the exclusion is one of mental patients *qua* mental patients. In striking down a discrimination against some illegitimate children, this Court noted that: "It makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy* [*v. Louisiana*, 391 U.S. 68 (1978)]; the discrimination remains apparent." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). *See also Mathews v. Lucas*, 427 U.S. 495, 504-505 n. 11 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974). In *Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), the classifications found invalid as sex discrimination did not affect all women, but only those whose husbands

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* The Secretary's reliance on *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) is therefore misplaced. *Feeney* concerned a facially gender-neutral Massachusetts statute which had only an indirect disparate effect on women, and one not excluding women *qua* women from the benefit the statute conferred. There was nothing in the legislative history indicating that Massachusetts had enacted the statute "because of," rather than merely "in spite of" its impact upon women. 442 U.S. at 279. The statutory scheme here, by reference to Medicaid, excludes appellees because of their status as mental patients in public mental institutions.

were not dependent on the women for more than half of their support.

3. While the Secretary protests that the statute does not discriminate against mental patients, she then relies on the legislative history of the Medicaid exclusion of certain mental patients and asserts that "[t]he resulting exclusion from SSI . . . is justifiable for the same reasons. . . ." Jurisdictional Statement at 15.* Congress, of course, failed to state that it was excluding appellees from SSI for any reason, much less for the same reasons it had established the Medicaid exclusion. It is illogical to assume that Congress ever took such reasons into account in enacting 42 U.S.C. § 1382(e)(1), both because of Congress' silence on the matter and because the Medicaid-excluded class is, in fact, bifurcated for SSI purposes: the private mental hospital group excluded from Medicaid is granted SSI.

It is therefore questionable whether the reasons for the Medicaid exclusion are available here for the Secretary to advance in support of the SSI classification. In reviewing provisions of the Social Security Act, as elsewhere, this Court normally will not test governmen-

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* The Medicaid restrictions on inpatient psychiatric care costs in public and private institutions have been upheld in *Legion v. Richardson*, 354 F.Supp. 456 (S.D.N.Y. 1973), *aff'd mem. sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973) (upholding Medicaid exclusion of public and private inpatient psychiatric care for persons under 65, and Medicare restrictions on inpatient psychiatric care); *Kantrowitz v. Weinberger*, 388 F.Supp. 1127 (D.D.C. 1974), *aff'd* 530 F.2d 1034 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 819 (1976); and *Woe v. Mathews*, 408 F.Supp. 419 (E.D.N.Y. 1976), *aff'd mem. sub nom. Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978) (upholding exclusion from Medicaid of institutional costs of persons 21-64 after the statute was amended, after *Legion*, *supra*, to include psychiatric hospital inpatient care for children).

tal action for fictitious purposes "or accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). *See also Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (*per curiam*); *Eisenstadt v. Baird*, 405 U.S. 438, 448, 450 (1972); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). In this case an examination of the SSI statute and the legislative history demonstrates not merely that there is no articulated or obvious purpose to the discrimination, but also that the discriminatory exclusion itself was fortuitous, the result—not apprehended by Congress—of the interaction of two complex statutes.

4. If the reasons supporting the rationality of the Medicaid exclusion are taken to be available to the Secretary, however, their constitutional sufficiency for Medicaid purposes hardly establishes that they also offer a rational basis for the SSI exclusion. The rationality of the SSI exclusion cannot be measured in the context of the Medicaid program or Congress' findings with respect to the provision of medical care, but rather must be examined in the context of the SSI program, and Congress' findings with respect to it. *See United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (presumably valid dependency provisions in the Internal Revenue Code incorporated into a provision of the Food Stamp Act; food stamp provision unconstitutional because unrelated to Congressionally defined purpose of the Food Stamp Program); *Mathews v. Lucas*, 427 U.S. 495 (1976), and *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (state laws regarding inheritance rights of illegitimate children incorporated into the Social Security

Act in determining public benefit rights; Social Security provisions unconstitutional); *Medora v. Colautti*, 602 F.2d 1149, 1153 (3rd Cir. 1979) (different welfare programs, to meet rational relationship test, "must independently assess need. . . .").

The reasons advanced for the exclusion of certain public and private mental hospital patients from Medicaid have no logical application to the exclusion of certain public mental hospital patients from SSI. Medicaid is designed to improve the state's ability to furnish medical assistance to its indigent residents. 42 U.S.C. § 1396. The Medicaid exclusion has been upheld on the basis of Congress' reluctance—expressly articulated—to fund the extremely expensive institutional costs of mental hospital medical care, when Congress regarded the provision of such care to be a traditional state function, and thought community based care to be preferable in any event. *See Legion v. Richardson*, 354 F.Supp. at 459; Jurisdictional Statement at 13-15. The refusal to subsidize certain preexisting state medical care was a rational policy judgment in a program directed at assisting the states in limited ways to provide medical care.

The purpose of the SSI program is quite different. It is a wholly federal program providing subsistence grants to individuals for *non-medical* costs on a uniform national basis. There is no Congressional finding that the provision of the $25 monthly SSI benefit to appellees would be either expensive or had been or properly should be assumed by the states. On the contrary, the cost of providing the benefit is *de minimis*, in the context of the SSI program (see pp. 18-19, *infra*). Moreover, in enacting the SSI program, Congress essentially preempted the field of income maintenance for the aged,

blind and disabled, including those residing in public and private medical institutions. Congress, recognizing that institutionalized persons are ordinarily without the funds to meet their personal needs, has not distinguished between appellees and other institutionalized persons. See pp. 7-8, *supra*. Indeed, the Secretary does not argue that appellees have less need for the $25 benefit than aged, blind and disabled persons residing in other medical institutions. Nothing in the record would, in any event, support any such contention. The Secretary argues only that it is constitutionally permissible for Congress to deny these individuals modest SSI cash assistance grants to meet essential *personal* needs because eight years previously Congress had found that their *medical* needs were being met by the institutions in which they resided.

Except as to appellees Congress has recognized and applied in the Social Security Act the logical distinction between cash grants to individuals for their non-institutional needs and payments to the states for medical institutional costs. The Medicaid exclusion of residents of private psychiatric hospitals does not cause an SSI exclusion. See p. 5, *supra*. In the Medicare and Social Security context, as well, ineligibility for inpatient psychiatric care does not trigger ineligibility for cash benefits.* Outside of the institutional context the same is

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* Medicare 42 U.S.C. § 1395 *et seq.* (1976 & Supp. II 1978) and Social Security, 42 U.S.C. § 401 *et seq.* (1976 & Supp. II 1978) are, respectively, the federal medical insurance and cash income maintenance provisions for indigent aged and disabled persons. They thus parallel, for their beneficiaries, the Medicaid medical vendor payment and SSI cash income maintenance provisions for indigent aged and disabled persons. In Medicare there are limiting rules for in-patient psychiatric hospital care in a public or private

(Footnote continued on following page)

true; not all Medicaid recipients receive SSI, and not all SSI recipients receive Medicaid. *See, e.g.*, 42 U.S.C. §§ 1396a(a)(10)(C), 1396a(f).

In *Koe v. Califano*, 573 F.2d 761 (2d Cir. 1978), plaintiffs, aged public mental hospital patients, were threatened with loss of both their Medicaid and SSI benefits because the hospital in which they resided faced loss of its accreditation.* They sued to enjoin the threatened SSI termination; the Medicaid exclusion was not challenged. The Second Circuit did not reach the merits of their claim, but nevertheless expressed unusual concern about the substance of the case:

> Plaintiffs' counsel points out that a monthly stipend of twenty-five dollars, while inconsequential to most, assumes a very different light in the eyes of an involuntarily institutionalized mental patient with no other source of income. The hospital provides food and shelter, but for plaintiffs and their counterparts it is only the SSI payments that make possible the purchase of personal items essential to any human existence transcending bare subsistence. The loss of such payments imposes a readily understandable burden; less obvious but perhaps no less significant are the uncertainty and feelings of rejection inflicted by the continuous threat of deprivation on those who have so little and are mentally ill. *Koe*, 573 F.2d at 763 n.5.

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footnote continued

hospital, principally a 190 day lifetime limitation which is not placed on non-psychiatric hospital care. 42 U.S.C. § 1395d. *See Legion v. Richardson*, 354 F.Supp. at 458. The Social Security cash payment for the individual's non-medical needs, however, is not terminated when Medicare discontinues coverage of the psychiatric hospital bill.

* Medicaid benefits to public psychiatric hospitals, while normally available on behalf of persons under 21 or over 64, depend on the accreditation of the hospital.

The Second Circuit saw no analogy to the Medicaid exclusion, even though it recognized, *id.* at 762 n.1, that it had upheld that exclusion (for patients 21-64 in mental hospitals) just eight months previously in *Woe v. Weinberger*, 562 F.2d 40 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978). *Koe* therefore implicitly recognizes that Congress' concern about directly subsidizing certain institutions through Medicaid has no bearing on the denial of SSI for patients' personal needs not met by the institution's provision for food, shelter and medical care.

The *Koe* discussion gives appropriate recognition to the crucial significance of the $25/month payment. Hypothetically, Congress might have been able to exclude all institutionalized persons from benefits, based on an assumption that such individuals had less need for SSI. But Congress did not do so.* Rather it has provided benefits for virtually all persons in private and public medical institutions, reducing the regular benefits based on a proper assumption that residents of such institutions have a lesser but still significant need for income maintenance. The institutions provide food, shelter and medical care.** The $25 monthly SSI benefit denied to appellees is critical "to take care of small personal expenses." H.R. REP. NO. 451 (Part I), 96th Cong., 1st Sess. 153 (1979). The ability to meet such expenses—for reading material, non-institutional clothing, pay phones,

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* "The Constitution imposes no obligation" to establish a public benefit program, but once the legislature "decides to alleviate some of the hardships of poverty . . . the manner in which it dispenses benefits is subject to constitutional limitations." *Maher v. Roe*, 432 U.S. 464, 469-70 (1977).

** The Secretary has defined an "institution" for purposes of the SSI program as providing "food and shelter . . . [and] some treatment or services. . . ." 20 C.F.R. § 416.231(b)(1)(1979).

cosmetics and personal toiletries—is extremely important to institutionalized persons, as Congress has recognized. Aside from making the benefit at issue here part of the SSI entitlement, Congress has provided that skilled nursing facilities and intermediate care facilities must have methods to protect patients' personal funds, 42 U.S.C. §§ 1395x(j)(14), 1396a(a)(28), 1396d(c)(4). The Secretary is required to define by regulation items covered by the personal funds of patients as opposed to costs included in institutional reimbursement. Act of Oct. 25, 1977, Pub. L. 95-142, § 21(b), 91 Stat. 1207; Act of June 13, 1978, Pub. L. 95-292, § 8(c), 92 Stat. 316. Patients in skilled nursing homes and intermediate care facilities must be allowed to have personal clothing and possessions except to the degree medically contraindicated. 42 C.F.R. §§ 405.1121(k)(13), 442.311(k), 442.404 (k) (1979).*

One commentator has described the desocialization process associated with depriving the institutional resident of personal possessions:

> One set of the individual's possessions has a special relation to self. The individual ordinarily expects to exert some control over the guise in which he appears before others. . . . For this he needs cosmetic and clothing supplies. . . . E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES, 19-20 (1961).

An Illinois study has found that the length of mental hospital stay of a majority of the sample of patients was prolonged by the desocialization syndrome described by

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* HEW defines personal possessions to include "books, pictures, games, radios, arts and crafts materials, religious articles, toiletries, jewelry, and letters." 42 C.F.R. § 442.436 (1979).

Goffman. Hansell and Benson, *Interrupting Long-Term Patienthood: A Cohort Study*, ARCHIVES OF GENERAL PSYCHIATRY, March 1971, Vol. 24, p. 238.

There is nothing in the statute, its history, or the Secretary's or any court's understanding of it, which justifies any notion that the SSI exclusion is based on the same assumptions as underlie the comparable but not identical Medicaid exclusion. Bereft of such support, the Secretary asserts that the SSI link to Medicaid is related to alleged "concern that federal funds be received on behalf of [*] residents of qualified institutions," and the alleged "fact that [appellees] are not 'similarly situated' with Medicaid patients in terms of federal interest and control." Jurisdictional Statement at 6 n.7. The Secretary's justifications in fact reflect the absurdity of the exclusion. For residents in private medical institutions, including mental hospitals, SSI eligibility depends neither on the Medicaid qualifications of the institution nor the federal control inherent in institutional receipt of Medicaid funds. Moreover, Congress has required each state to establish and enforce standards (regarding, *e.g.*, safety, sanitation and civil rights) for any category of institutions in which a significant number of SSI recipients reside. 42 U.S.C. § 1382e(e)(1). This supervisory authority is triggered by SSI, not Medicaid, payments. Thus, there is no merit to the Secretary's arguments that SSI should be limited to residents of facilities otherwise meeting governmental standards in general, or Medicaid standards in particular. That is not the way the SSI statute is structured.

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* The Secretary's reference to payments on the residents' "behalf" confuses Medicaid and SSI. The SSI payment is to the individual for his personal needs, not to the institution on behalf of the person for institutional costs.

The Secretary also suggests that the statutory exclusion might be justified solely on the basis of "the conservation of federal resources." Jurisdictional Statement at 6 n.7; 7. Fiscal concerns alone are never the basis for this Court's upholding otherwise invidiously discriminatory legislation. If they were, no underinclusive classification denying public benefits would be subject to constitutional scrutiny. *Compare Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973).*

In any case, the government's fiscal interest in denying appellees a $25/month SSI grant is insubstantial. Based on the record and available data, the government's estimate of an annual cost of $95 million, Jurisdictional Statement at 7 n.8, is wildly inflated; a more accurate figure would be $6 million/year. At any given time there are 200,000 persons nationally in psychiatric hospitals. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1978). Over half of the mentally ill in hospitals are over 64 and therefore not excluded by 42 U.S.C. § 1382(e). S. REP. NO. 416, 96th Cong., 1st Sess. 18 n.50 and surveys cited therein. There are thus fewer than 100,000 non-aged persons in mental hospitals at

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* When this Court has regarded the government's fiscal concerns as buttressing an otherwise rational basis for underinclusive classification, the classification upheld ordinarily has not involved an absolute denial of benefits, such as that at issue here, but rather has involved differences in relative benefit levels. *Compare* cases cited in text with *Dandridge v. Williams*, 397 U.S. 471 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972). *See Medora v. Colautti*, 602 F.2d at 1153 n.9.

any given time. Since the exclusion effected by 42 U.S.C. § 1382(e) only occurs when the person is in the hospital for a full month, the number of persons situated similarly to appellees nationally cannot exceed 100,000, for a monthly cost of $2½ million. But of the 100,000, many are not excluded by the provisions at issue here because they are one or more of the following: a) in private hospitals; b) children; c) not indigent due to resources in excess of SSI limits; d) not indigent due to income in excess of SSI limits (for example, while mental inpatients normally do not have regular employment, some are insured by Social Security and have monthly income from that source); or e) in the hospital for less than a month. In the District Court plaintiffs made, based on such factors, an estimate of "at least 20,000 persons" as the number of mental inpatients excluded nationally. Memorandum in Support of Plaintiffs' Motion for Summary Judgment and Declaration of Class Action, *etc.*, at 9, filed 7/12/74. The Secretary has never disputed this estimate. 20,000 grants/month of $25 would cost the Secretary $6 million/year.*

The statutory exclusion at issue here resembles the ballot nominating statute in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). The discriminatory exclusion of appellees is an "historical accident," *id.* at 187. It is not the "considered product of a legislature," *id.* at 191 (Rehnquist, J., concurring); rather it is "a legislative remnant [which was] . . . a malfunction of the legislative process. . . ." *id.* at 189 (Stevens, J., concurring).

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* By comparison, the SSI program cost over $5,500,000,000 in FY 1979. Act of Oct. 18, 1978, Pub. L. No. 95-480, Title II, 92 Stat. 1581. Of the 4,235,939 SSI recipients in December, 1976, 5% (about 212,000) were receiving $25/month based on 42 U.S.C. § 1382(e)(1)(B). SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL SUPPLEMENT, 1976 at 193.

In *James v. Strange*, 407 U.S. 128 (1972) this Court invalidated a state provision regarding recoupment of criminal defense costs without the exemptions normally available to judgment debtors. Unlike the exclusion in this case, the statute in *James* was judicially recognized as reflecting a valid state interest. It still could not withstand constitutional scrutiny:

> State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before [the Court] embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law. *Id.* at 141-142.

The statutory exclusion at issue here is as bizarre and thoughtless as those in *Illinois State Board of Elections* and *James*, and it violates appellees' rights under the equal protection component of the due process clause of the fifth amendment to the United States Constitution. Congress has valid interests in fiscal concerns and in limiting payments to institutionalized individuals by only providing for personal essentials. The total exclusion of appellees is, however, without any rational basis. Indeed it seems not to have been the product of any deliberate legislative decision; the legislative record suggests Congress did not recognize that appellees—as opposed to "inmates of penal institutions"—would be denied benefits.

The Secretary does not argue that appellees do not fall within this Congressional definition of need; in effect she argues only that it is permissible to penalize the individuals because Congress does not want to subsidize the institutions. This is an irrational penalty, rather than a rational basis for exclusion; it is as if Congress withheld welfare grants for food and clothing for in-

digent persons living in substandard public housing or attending segregated schools because Congress had decided not to subsidize the institutional costs of such housing or schools. *See Medora v. Colautti*, 602 F.2d at 1155 n.14 (governmental action making recipients into "hostages" is an insufficient ground for exclusion of recipients from a welfare program). Nor can the Secretary articulate any reason for the exclusion that is rationally related to the statutory purpose of meeting the essential personal needs of aged, blind and disabled persons, including those in medical institutions. The exclusion is simply an aberration which, like that in *James*, "embodies elements of punitiveness" and "blight[s] . . . the hopes of indigents for self-sufficiency and self-respect."

5. As discussed, the exclusion of appellees bears no rational relationship to any legitimate governmental purpose; the discrimination violates appellees' rights under the equal protection component of the fifth amendment due process clause under any articulation of the equal protection standard. In order to affirm summarily, this Court thus need not apply the heightened scrutiny standard the District Court used.* The District Court was, however, also correct in finding the

* Summary affirmance by this Court disposes of the precise question presented and necessarily decided in the judgment affirmed; no resolution of other matters may be inferred. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 182-83, and cases cited therein. Moreover, the Rehabilitation Act of 1973, as amended, protects the mentally ill, and other handicapped persons, from discrimination in federal and federally assisted programs, 29 U.S.C. § 794, and so limits substantially the number of cases regarding discrimination against the mentally ill which might otherwise need to be decided by the courts on constitutional grounds. This makes the prospective impact of a summary affirmance here even more limited than it would be otherwise.

discrimination invalid under a heightened standard of review. That standard is substantially less rigorous than the "strict" scrutiny to which racial classifications are subject, but it does require that, to be constitutional, the legislative classification must serve "important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 428 U.S. 190, 197 (1976).

Mental patients have the crucial characteristics that have been the basis for heightened review of discrimination against other groups. Mental institution residents are a "discrete and insular minorit[y]," with disproportionately limited political influence. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). Virtually all states disenfranchise the "insane." S. BRAKEL and R. ROCK, THE MENTALLY DISABLED AND THE LAW (1971) 308, 333 (Table 9.4). While some psychiatric inpatients retain the right to vote, institutional restrictions may effectively limit the extent to which the patient can seek to influence the political process. In short, the "mentally ill constitute a minority segment of the polity which is often disenfranchised . . . and which is virtually powerless to improve its circumstances through the political process." *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1229 n.153 (1974)*

This Court has noted the stigmatization inherent in civil commitment. *Vitek v. Jones*, ... U.S. ..... , 48 L.W.

* Contrary to the Secretary's suggestion (Jurisdictional Statement at 12 n.11), the partial inclusion of mental patients in the SSI program does not show that they are not discriminated against. Nor does it indicate that their political powerlessness or stigmatization may not explain the discrimination. See pp. 9-10, *supra*. *See also Nyquist v. Mauclet*, 432 U.S. 1 (1977), and *Graham v. Richardson*, 403 U.S. 365 (1971) (discrimination against limited groups of aliens).

4317, 4320 (March 25, 1980); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979). Mental hospitalization subjects a member of the group to "a stigma of inferiority and a badge of opprobrium." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

Given the political and social isolation of appellees, Congressional inattention to the SSI exclusion of mental patients is unsurprising. The unique disabilities of institutionalized persons, especially the mentally ill, however, occasionally have been the subject of Congressional attention. A recent report of the Senate Judiciary Committee described "the unique inability of institutionalized persons to assert their own rights" due to lack of awareness of rights, intellectual or emotional incapacity, conditioning to accept their institutional environments, lack of capacity to sue, physical isolation, lack of money, and complete dependence on the institutional environment. S. REP. NO. 416, 96th Cong., 1st Sess. 19-20, 27 (1979).

Sen. Long, floor manager of the original Medicaid bill, alluded to the same problems in supporting the coverage in that bill of patients aged 65 or older in psychiatric and tubercular hospitals:

> I am also particularly happy that my lengthy struggle to eliminate the archaic exclusion of Federal assistance to the mentally ill and the victims of tuberculosis has proved worthwhile.
>
> * * *
>
> [W]e have, at long last, removed these residual shackles from the feet of those, who, by the accident of history, have been overlooked, and left behind, because they were relatively small in numbers or could not speak for themselves. 111 CONG REC. 15037 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS, 2285, 2287.

The Secretary asserts that no special scrutiny is appropriate because mental illness relates to "ability to perform or contribute to society," citing *Frontiero v. Richardson*, 411 U.S. at 686 (plurality opinion), and *Doe v. Colautti*, 592 F.2d 704, 711 (3rd Cir. 1979). Jurisdictional Statement at 12. The plurality opinion in *Frontiero* was addressing criteria for strict scrutiny, rather than commenting on the possibility of some heightened review, short of strict scrutiny, applicable to discrimination against a politically powerless minority. *Frontiero* does not suggest the proposition that a group which meets all of the "traditional indicia of suspectness" articulated just a few weeks earlier in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), is entitled to no special judicial protection. Those indicia were that the group had been:

> . . . saddled with such disabilities, or subject to such a history of purposeful inequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection. . . . 411 U.S. at 28.

Many of the groups to which this Court has given special protection do not meet all of the variously articulated criteria for triggering special scrutiny of discrimination.*

Moreover, the government has here created the SSI program in part to mitigate or compensate for the inability of the program's beneficiaries, including the

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* Women are not an insular minority. *See Frontiero*, 411 U.S. at 686 n.17. Alienage is not an "immutable characteristic determined solely by accident of birth." *Frontiero*, 411 U.S. at 686. *See Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). Moreover, there is increasing evidence that some forms of mental illness are genetically based, *i.e.*, accidents of birth. *See, e.g.*, MASUR AND ROBERTSON, BIOLOGY AND SOCIAL BEHAVIOR 61-62 (1972).

mentally disabled, to "perform or contribute."* Measured against this purpose, the government's contention that the mentally disabled appellees in this case should be given no special judicial protection precisely *because* of that inability is simply perverse, particularly since the statutory exclusion here may prolong or intensify the very disability triggering SSI eligibility.

To be sure, the inability of some mental patients to "perform or contribute" might well constitute a sufficient basis for a carefully honed exclusion in some contexts (e.g., voting) in which the government plausibly could assert that the inability is rationally related to the exclusion.** In this case, however, the government makes no such assertion. Nor could it. Rather, the statutory exclusion is the simple product of circumscribing a class of persons with no political power and "characterized by some unpopular trait" resulting in a "special likelihood of bias on the part of the ruling majority." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979). In such circumstances the dangers to the group are such that discriminatory legislation should be invalidated unless it is "carefully tuned to alternative considerations." *Mathews v. Lucas*, 427 U.S. at 513.

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* Mental illness generally may not be correlated with inability to perform, the Secretary's assertion notwithstanding. Jurisdictional Statement at 12. In severe manifestations, however, mental illness causes an inability to perform which, because it is disabling, triggers SSI eligibility.

** This Court occasionally has applied varying equal protection standards to discrimination against a single group depending on the context. *See Ambach v. Norwich*, 441 U.S. 68 (1979) (applying rational relationship test to exclusion of aliens).

CONCLUSION

42 U.S.C. § 1382(e)(1) denies appellees' rights under the equal protection component of the fifth amendment due process clause insofar as it excludes appellees from the $25/month SSI benefits otherwise accorded residents of medical institutions. The exclusion effected by the Social Security Act has no basis rationally related to, much less substantially furthering, any legitimate governmental interest. The District Court's judgment conflicts with no decision of this Court or any other court and should be summarily affirmed. *See Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd mem.*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F.Supp. 1226 (D. Md. 1972), *aff'd mem.* 409 U.S. 1069 (1972); and *Davis v. Richardson*, 342 F.Supp. 588 (D. Conn. 1972), *aff'd mem.* 409 U.S. 1069 (1972).

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APPENDIX A

Section 1905 of the Social Security Act, 42 U.S.C. § 1396d, provides in pertinent part:

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services

* * *

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; and

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.